



ATTORNEYS AT LAW



Robert Greene Sterne  
Jorge A. Goldstein  
David K.S. Cornwell  
Robert W. Esmond  
Tracy-Gene G. Durkin  
Michele A. Cimbala  
Michael B. Ray  
Robert E. Sokohl  
Eric K. Steffe  
Michael Q. Lee  
John M. Covert  
Robert C. Millonig  
Donald J. Featherstone  
Timothy J. Shea, Jr  
Michael V. Messinger  
Judith U. Kim  
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Eldora L. Ellison  
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Cynthia M. Bouchez  
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Randall K. Baldwin

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Mita Mukherjee\*  
Scott M. Woodhouse\*  
Christian A. Camarce\*  
Richard D. Collier III\*  
Keisha Hyton-Rodic  
Bonnie Nannenga-Combs  
Alyssa K. Sandrowitz\*  
Jonathan M. Strang\*  
Ishan P. Weerakoon\*  
**Registered Patent Agents\***  
Karen R. Markowicz  
Matthew J. Dowd  
Peter A. Socaras  
Danielle L. Letting  
Steven C. Oppenheimer

Aaron S. Lukas  
Gaurav Asthana  
Stephanie L. Elmer  
Robert E. Bakin  
Salvador M. Bezios  
Yasser Mountada  
**Of Counsel**  
Edward J. Kessler  
Kenneth C. Bass III  
Marvin C. Guthrie  
Christopher P. Wrist  
David C. Isaacson  
  
\*Admitted only in Maryland  
\*Admitted only in Virginia  
\*Practice Limited to Federal Agencies

June 30, 2008

**WRITER'S DIRECT NUMBER:**  
(202) 772-8512  
**INTERNET ADDRESS:**  
JPOHL@SKGF.COM

Commissioner for Patents  
PO Box 1450  
Alexandria, VA 22313-1450

**Art Unit 2132**

**Attn: Mail Stop Appeal Brief - Patents**

Re: U.S. Utility Patent Application  
Application No. 10/810,443; Filed: March 26, 2004  
For: **Computer Virus Screening Methods and Systems**  
Inventors: FRANCZEK *et al.*  
Our Ref: 2222.5230005

Sir:

Transmitted herewith for appropriate action are the following documents:

1. Brief on Appeal Under 37 C.F.R. §41.37;
2. Fee transmittal;
3. Credit Card Payment Form (PTO-2038) in the amount of \$510.00 to cover:  
\$510 for filing a brief in support of an appeal; and
4. Return postcard.

It is respectfully requested that the attached postcard be stamped with the date of filing of these documents, and that it be returned to our courier.

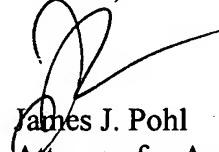
In the event that extensions of time are necessary to prevent abandonment of this patent application, then such extensions of time are hereby petitioned.

Commissioner for Patents  
June 30, 2008  
Page 2

The U.S. Patent and Trademark Office is hereby authorized to charge any fee deficiency, or credit any overpayment, to our Deposit Account No. 19-0036.

Respectfully submitted,

STERNE, KESSLER, GOLDSTEIN & FOX P.L.L.C.



James J. Pohl  
Attorney for Applicants  
Registration No. 60,724

JDE/JJP/la  
Enclosure(s)

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Effective on 12/08/2004.

Fees pursuant to the Consolidated Appropriations Act, 2005 (H.R. 4818).

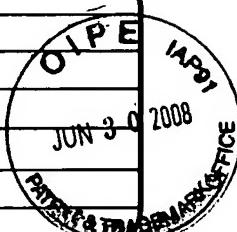
# FEE TRANSMITTAL

## For FY 2008

 Applicant claims small entity status. See 37 CFR 1.27TOTAL AMOUNT OF PAYMENT (\$)**510**

## Complete if Known

Application Number	<b>10/810,443</b>
Filing Date	<b>March 26, 2004</b>
First Named Inventor	<b>Edward J. FRANCZEK</b>
Examiner Name	<b>Almeida, Devin E.</b>
Art Unit	<b>2132</b>
Attorney Docket No.	<b>2222.5230005</b>



## METHOD OF PAYMENT (check all that apply)

Check  Credit Card  Money Order  None  Other (please identify): \_\_\_\_\_

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 Charge any additional fee(s) or underpayments of fee(s)  Credit any overpayments

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## FEE CALCULATION

## 1. BASIC FILING, SEARCH, AND EXAMINATION FEES

Application Type	FILING FEES		SEARCH FEES		EXAMINATION FEES		Fees Paid (\$)
	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	
Utility	310	155	510	255	210	105	_____
Design	210	105	100	50	130	65	_____
Plant	210	105	310	155	160	80	_____
Reissue	310	155	510	255	620	310	_____
Provisional	210	105	0	0	0	0	_____

## 2. EXCESS CLAIM FEES

## Fee Description

Each claim over 20 (including Reissues)

Each independent claim over 3 (including Reissues)

Multiple dependent claims

Total Claims	Extra Claims	Fee (\$)	Fee Paid (\$)	Small Entity Fee (\$)	Fee (\$)
_____	- 20 or HP = _____	x _____	= _____	50	25
HP = highest number of total claims paid for, if greater than 20.				210	105

Indep. Claims	Extra Claims	Fee (\$)	Fee Paid (\$)	Multiple Dependent Claims
_____	- 3 or HP = _____	x _____	= _____	Fee (\$)

HP = highest number of independent claims paid for, if greater than 3.

## 3. APPLICATION SIZE FEE

If the specification and drawings exceed 100 sheets of paper (excluding electronically filed sequence or computer listings under 37 CFR 1.52(e)), the application size fee due is \$260 (\$130 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s).

Total Sheets	Extra Sheets	Number of each additional 50 or fraction thereof	Fee (\$)	Fee Paid (\$)
_____	- 100 = _____	/ 50 = _____ (round up to a whole number)	x _____	= _____

## 4. OTHER FEE(S)

Non-English Specification, \$130 fee (no small entity discount)

Other (e.g., late filing surcharge): filing a brief in support of an appeal **510**

## SUBMITTED BY

Signature		Registration No. (Attorney/Agent)	<b>60,724</b>	Telephone	<b>(202) 371-2600</b>
Name (Print/Type)	<b>James S. Pohl</b>			Date	<b>6/30/08</b>

This collection of information is required by 37 CFR 1.136. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 30 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:

FRANCZEK *et al.*

Application No.: 10/810,443

Filed: March 26, 2004

For: Computer Virus Screening  
Methods and Systems

Confirmation No.: 8971

Art Unit: 2132

Examiner: Almeida, Devin E.

Atty. Docket: 2222.5230005

**Brief on Appeal Under 37 C.F.R. § 41.37**

***Mail Stop Appeal Brief - Patents***

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

A Notice of Appeal from the Final Rejection of claims 1-20 was filed on April 30, 2008. Appellants hereby file one copy of this Appeal Brief, together with the required fee set forth in 37 C.F.R. § 41.20(b)(2).

It is not believed that extensions of time are required beyond those that may otherwise be provided for in documents accompanying this paper. However, if additional extensions of time are necessary to prevent abandonment of this application, then such extensions of time are hereby petitioned under 37 C.F.R. § 1.136(a), and any fees required therefor (including fees for net addition of claims) are hereby authorized to be charged to our Deposit Account No. 19-0036.

07/01/2008 JAD001 00000100 10810443  
01 FC:1402 510.00 OP

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**I.       *Real Party In Interest (37 C.F.R. § 41.37(c)(1)(i))***

The real party in interest in this appeal is AUCTNYC 8, L.L.C., having its principal place of business at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. An assignment of all right, title and interest in and to the above-captioned patent application from Verve, L.L.C. to AUCTNYC 8, L.L.C. was recorded at the U.S. Patent & Trademark Office (USPTO) on March 5, 2007 at Reel 018951, Frame 0538.

***II. Related Appeals and Interferences (37 C.F.R. § 41.37(c)(1)(ii))***

Appellants, including the undersigned legal representative and the assignee of the above-captioned application, are aware of no pending appeals or interferences that will directly affect, or be directly affected by, or have a bearing on the Board of Patent Appeals and Interferences (“the Board”) in the pending appeal.

***III. Status of Claims (37 C.F.R. § 41.37(c)(1)(iii))***

The Application was filed on March 26, 2004, and was assigned U.S. Application No. 10/810,443 (herein “‘443 application”). The ‘443 application originally included claims 1-20. On March 22, 2007, the Examiner mailed a Non-final Office Action rejecting claims 1-20. The Appellants responded on September 24, 2007, by filing an Amendment and Reply Under 37 C.F.R. § 1.111, in which claims 1, 5, and 11 were amended, but no claims were canceled or added. The Examiner mailed a Final Office Action (herein “Final Office Action”) rejecting claims 1-20 for a second time on November 1, 2007. On January 31, 2008, the Appellants responded by filing an Amendment and Reply Under 37 C.F.R. § 1.116, in which no claims were amended, added, or canceled. On February 20, 2008, the Examiner mailed an Advisory Action maintaining the Final Rejection of claims 1-20. On April 30, 2008, Appellants filed a Arguments to Accompany an Pre Appeal Brief Request for Review. On May 16, 2008, the Panel mailed a Notice of Panel Decision from Pre Appeal Brief Review, deciding the application should proceed to the Board of Patent Appeals and Interferences.

Claims 1-20 are on appeal. A copy of the claims on appeal can be found in the attached Claims Appendix.

***IV. Status of Amendments (37 C.F.R. § 41.37(c)(1)(iv))***

No amendments to the claims have been submitted subsequent to the Final Office Action mailed November 1, 2007. All amendments to the claims previously presented during prosecution have been entered.

**V. Summary of Claimed Subject Matter (37 C.F.R. § 41.37(c)(1)(v))**

Exemplary portions of the specification providing support for claimed subject matter are provided below for each of the independent claims involved in the appeal. The explanation here refers to the specification by page and line number, and to the drawings, if any, by reference characters.

**Independent claim 1** recites a method. The method includes:

receiving computer data from a first computer for transmission to a second computer via a network (see, for example, in one embodiment specification, page 5, lines 7-13; page 12, line 28 - page 13, line 24; page 30, lines 1-7; page 30, lines 8-22; Fig. 1, element 10; Fig. 3, elements 106 and 110; Fig. 8, element 420; Fig. 9, element 456; originally-filed claim 1); and

screening the computer data for at least one virus before communicating the computer data to the second computer, wherein said screening comprises creating a model of the second computer, installing a program contained in the computer data on the model, and screening the model for the at least one virus (see, for example, in one embodiment specification, page 5, line 14 - page 8, line 3; page 13, line 17 - page 14, line 5; page 18, line 9 - page 19, line 12; Fig. 4, elements 206 and 220; Fig. 5, element 212; originally-filed claim 1).

**Independent claim 5** recites a virus screening device operative to be connected to a network and operative to screen computer data received from a first computer for at least one virus before communicating the computer data to a second computer. The virus screening device includes:

a model of the second computer, the model configured to have a program contained in said computer data installed thereon, and wherein said model is further configured to be screened for the at least one virus (see, for example, in one embodiment specification, page 5, line 14 - page 8, line 3; page 13, line 17 - page 14, line 5; page 18, line 9 - page 19, line 12; Fig. 4, elements 206 and 220; Fig. 5, element 212; originally-filed claim 5).

**Independent claim 11** recites a method. The method includes:

receiving screened data from a network-based virus screening device configured to screen data for at least one virus before communicating the data to a first computer, wherein said screening of data comprises creating a model of the first computer, installing on the model a program contained in the data, and screening the model for the at least one virus (see, for example, in one embodiment specification, page 5, line 7 - page 8, line 3; page 12, line 28 - page 13, line 24; page 18, line 9 - page 19, line 12; page 30, lines 1-7; page 30, lines 8-22; Fig. 1, element 10; Fig. 3, elements 106 and 110; Fig. 4, elements 206 and 220; Fig. 5, element 212; Fig. 8, element 420; Fig. 9, element 456; originally-filed claim 11); and

forwarding the screened data to the first computer (see, for example, in one embodiment specification, page 5, lines 7-13; page 12, line 28 - page 13, line 24; page 30, lines 1-7; page 30, lines 8-22; Fig. 1, element 10; Fig. 3, elements 106 and 110; Fig. 8 - element 420; Fig. 9, element 456; originally-filed claim 11).

**VI. *Grounds of Rejection to be Reviewed on Appeal (37 C.F.R. § 41.37(c)(1)(vi))***

A concise statement listing the ground of rejection presented for review follows.

**A. *Ground 1***

Claims 1-20 were rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over U.S. Patent No. 5,623,600 to Ji *et al.* (herein “Ji”) in view of U.S. Patent No. 5,440,723 to Arnold *et al.* (herein “Arnold”).

**VII. Argument (37 C.F.R. § 41.37(c)(1)(vii))**

**A. The Rejection of Claims 1-20 under 35 U.S.C. § 103(a) is in Error and Must be Reversed.**

**a) Claims 1-20 are Non-Obvious Because Ji Teaches Away from the Claims**

The Examiner fails to establish a *prima facie* case of obviousness in the Final Office Action of claims 1-20 under 35 U.S.C. § 103(a) because Ji teaches away from the claims. “A *prima facie* case of obviousness can be rebutted if the applicant . . . can show ‘that the art in any material aspect taught away’ from the claimed invention.” *In re Geisler*, 116 F.3d 1465, 1469 (Fed. Cir. 1997). “A reference may be said to teach away when a person of ordinary skill, upon reading the reference . . . would be led in a direction divergent from the path that was taken by the applicant.” *Tec Air, Inc. v. Denso Mfg. Mich. Inc.*, 192 F.3d 1353, 1360 (Fed. Cir. 1999). When determining if a cited reference teaches away, a reference should be considered as a whole, and portions arguing against or teaching away from the claimed invention must be considered. *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve, Inc.*, 796 F.2d 443, 230 USPQ 416 (Fed. Cir. 1986); *Gillette Co. v. S.C. Johnson & Sons, Inc.*, 919 F.2d 720, 724, 16 USPQ2d 1923, 1927 (Fed. Cir. 1990) (stating that the closest prior art reference “would likely discourage the art worker from attempting the substitution suggested by [the inventor/patentee]”). The United States Supreme Court has also recently opined about the impact of teaching away on nonobviousness, stating in *KSR Int'l. Co. v. Teleflex, Inc.* “[w]hen the prior art teaches away from combining certain known elements, discovery of successful means of combining them is more likely to be nonobvious.” 550 U.S. \_\_, 127 S. Ct. 1727, 82 U.S.P.Q.2d 1385 (2007).

The Appellants’ claims 1-20, including independent claims 1, 5, and 11, recite distinguishing features from which Ji teaches away. For example, claim 1 recites

(emphasis added) “wherein said screening comprises creating a model of the second computer, *installing a program contained in the computer data on the model*, and screening the model for the at least one virus,” claim 5 recites (emphasis added) “a model of the second computer, the model configured to have *a program contained in said computer data installed thereon*, and wherein said model is further configured to be screened for the at least one virus,” and claim 11 recites (emphasis added) “wherein said screening of data comprises creating a model of the first computer, installing on the model *a program contained in the data*, and screening the model for the at least one virus.” Thus, Appellants’ claims recite features that are directed towards execution *at an application level*.

In contrast, Ji explicitly teaches performing “*all virus screening below the application level*.” Ji, col. 6, lns. 11-13 (Emphasis added). Ji states “[t]he present invention is particularly advantageous because *all virus screening is performed below the application level*.” Ji, col. 6, lns. 11-13 (Emphasis added). Thus, since Ji explicitly requires operation *below the application level*, Ji leads the person of ordinary skill away from performing virus screening *at the application level*, down a divergent path from that claimed by the Appellants. Therefore, a *prima facie* case of obviousness is not established because Ji explicitly teaches away from the claimed feature of performing virus screening *at an application level*.

In the Advisory Action, the Examiner asserts that the combined teachings of Ji and Arnold suggest to those of ordinary skill in the art that the claimed features are obvious. To support this assertion, the Examiner states that a combination of Ji’s device and Arnold’s device “would not change the principle of operation of Ji [and] it would increase the effectiveness of the virus screener by scanning all the layers.” Advisory

Action, page 2. However, *the Advisory Action does not address the problem of Ji's explicit teaching away from performing virus screening at an application level, as claimed by the Appellants.* Ji teaches away from the Appellants' claims, thus Ji suggests to those of ordinary skill in the art to take a path *other than that claimed by the Appellants.* Further, the Advisory Action does not address how combining Ji's device and Arnold's device can be accomplished without changing principles of operation of Ji and/or Arnold, as discussed in further detail below.

Therefore, Appellants respectfully request that the Board reverse the Examiner's Final Rejection of claims 1-20 under 35 U.S.C. § 103(a) and forward this application for issue.

**b) *Claims 1-20 are Non-obvious Because a Combination of Ji's Device and Arnold's Device Cannot be Made for Technical Difficulties as It Would Require Changing a Principle of Operation***

Even assuming, which Appellants do not acquiesce to, Ji does not teach away from the claims, the Examiner fails to establish a *prima facie* case of obviousness in the Final Office Action of claims 1-20 under 35 U.S.C. § 103(a) because modifying or combining Ji's device with Arnold's device requires changing a principle of operation of Ji's device. It is well-settled that to establish a *prima facie* case of obviousness under 35 U.S.C. § 103(a), a proposed modification or proposed combination of references cannot change a principle of operation of a cited reference. According to the M.P.E.P., “[i]f the proposed modification or combination of the prior art would change the principle of operation of the prior art invention, then the teachings of the references are not sufficient to render the claims *prima facie* obvious.” M.P.E.P. § 2143.01(VI) (*citing In re Ratti*, 270 F.2d 810 (CCPA 1959)). *See also*, 72 Fed. Reg. 57526 (V)(1) (suggesting obviousness cannot be found when “(1) one of ordinary skill in the art could not have combined the claimed elements by known methods (e.g., due to technological difficulties”) and *Application of Irmscher*, 262 F.2d 85, 88 (CCPA 1958) (“a basic reference and additional references having features somewhat analogous to those disclosed by appealed claims, which require material and radical modification in order to conform to appellant’s claims, are not valid references unless they show an equivalent and operative combination which obviously could be substituted to meet the appealed claims by any skilled mechanic.”).

The Examiner admits on pages 2-3 in the Final Office Action that Ji's reference does not teach the distinguishing features described above. The Examiner then attempts to remedy these deficiencies of Ji by modifying or combining Ji's device with Arnold's

device, despite that doing so requires changing a principle of operation of Ji's device. Ji's device operates by performing *all virus screening below the application level*. Ji explicitly states “[t]he present invention is particularly advantageous because *all virus screening is performed below the application level*.” Ji, col. 6, lns. 11-13. (Emphasis added). Thus, performing *all virus screening below the application level* is a principle of operation of Ji's device that is *required* for Ji's device to provide what Ji states is a particularly important advantage of Ji's device.

Arnold's device includes a principle of operation in which data segregation is performed *at the application level*. See, Arnold, col. 7 ln. 67 through col. 8, ln. 60. Thus, Arnold performs virus screening *at the application level*. This teaching in Arnold is in direct conflict with the principle of operation of Ji requiring that *all virus screening is performed below the application level* since Arnold performs screening for a virus *at the application level*. A device resulting from the proposed combination of Ji and Arnold would function either below the application level or at the application level, *but not both*. Therefore, modifying or combining Ji's device with Arnold's device would necessarily change a principle of operation of either Ji's device, Arnold's device, or both devices. Therefore, under the above-noted well-settled law, Ji's device is neither modifiable nor combinable with Arnold's device, and the teachings of the references are not sufficient to render the claims *prima facie* obvious. Thus, the Examiner fails to establish a *prima facie* case of obviousness for independent claims 1, 5, and 11 in the Final Office Action.

As a result, the Examiner also fails to establish a *prima facie* case of obviousness in the Final Office Action for dependent claims 2-4, 6-10, and 12-20 because dependent claims 2-4, 6-10, and 12-20 are allowable for at least being dependent from their

respective allowable independent claims 1, 5, and 11, in addition to their own respective features. *See, In Re Fine*, 837 F.2d 1071 (Fed. Cir. 1988), and M.P.E.P. § 2143.03. Therefore, Appellants respectfully request that the Board reverse the Examiner's Final Rejection of claims 1-20 under 35 U.S.C. § 103(a) and forward this application for issue.

**VIII. Conclusion**

The subject matter of claims 1-20 is patentable over the cited references because the Examiner has failed to establish a *prima facie* case of obviousness. Therefore, Appellants respectfully request that the Board reverse the Examiner's final rejections of claims 1-20 under 35 U.S.C. § 103(a) and remand this application for issue.

Respectfully submitted,

STERNE, KESSLER, GOLDSTEIN & FOX P.L.L.C.

James J. Pohl  
Attorney for Appellants  
Registration No. 60,724

Date: 6/30/08

1100 New York Avenue, N.W.  
Washington, D.C. 20005-3934  
(202) 371-2600

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**IX. Claims Appendix (37 C.F.R. § 41.37(c)(1)(viii))**

1. A method comprising:

receiving computer data from a first computer for transmission to a second computer via a network; and

screening the computer data for at least one virus before communicating the computer data to the second computer, wherein said screening comprises creating a model of the second computer, installing a program contained in the computer data on the model, and screening the model for the at least one virus.

2. The method of Claim 1, wherein the network comprises an IP network.

3. The method of Claim 1 further comprising:

if the at least one virus is detected, performing at least one of the following:

(i) inhibiting communication of at least a portion of the computer data to the second computer;

(ii) removing the at least one virus from the computer data prior to transferring the computer data to the second computer;

(iii) communicating a message indicating that the at least one virus was detected to the second computer;

(iv) communicating a message indicating that the at least one virus was detected to the first computer; and

(v) writing data to a database indicating that the at least one virus was detected.

4. The method of Claim 1 further comprising:

receiving computer data from the second computer for transmission to the first computer; and

screening the computer data received from the second computer for at least one virus before communicating the computer data received from the second computer to the first computer.

5. A virus screening device operative to be connected to a network and operative to screen computer data received from a first computer for at least one virus before communicating the computer data to a second computer, the virus screening device comprising:

a model of the second computer, the model configured to have a program contained in said computer data installed thereon, and wherein said model is further configured to be screened for the at least one virus.

6. The system of Claim 5, wherein the network comprises an IP network.

7. The system of Claim 5, wherein a configuration associated with the second computer routes communicated data to the virus screening device.

8. The system of Claim 5, further comprising:

a third computer communicatively linked to the second computer via a local area network, wherein the virus screening device resides outside the local area network.

9. The system of Claim 5, wherein the computer data comprises an electronic mail message.

10. The system of Claim 5, wherein the computer data comprises data requested by the second computer from the first computer.

11. A method comprising:

receiving screened data from a network-based virus screening device configured to screen data for at least one virus before communicating the data to a first computer, wherein said screening of data comprises creating a model of the first computer, installing on the model a program contained in the data, and screening the model for the at least one virus; and

forwarding the screened data to the first computer.

12. The method of Claim 11, further comprising: receiving a request for requested data from the first computer;

sending the request across a network to a second computer; and  
requesting that the requested data be returned via the network-based virus  
screening device.

13. The method of Claim 11, wherein the network comprises an IP network.

14. The method of Claim 11, wherein the network-based virus screening  
device resides within a wide area network, and wherein the method further comprises:

receiving across a local area network a request for requested data from the first  
computer;

sending the request across the wide area network to a second computer; and

requesting that the requested data be returned via the network-based virus  
screening device.

15. The method of Claim 11, further comprising:

receiving a request for requested data from the first computer at a modem  
external to the first computer; and

initiating communication of the request from the modem across an IP network to  
a second computer.

16. The method of Claim 11, further comprising: forwarding a request to  
terminate a virus screening function of the network-based virus screening device.

17. The method of Claim 11, further comprising:

configuring the network-based virus screening device to inhibit communication  
of at least a portion of the requested data.

18. The method of Claim 11, further comprising:

configuring the network-based virus screening device to inhibit communication  
of executables to the first computer.

19. The method of Claim 11, wherein the network-based virus screening  
device resides within a wide area network, and wherein the method further comprises:

configuring the network-based virus screening device to inhibit communication of executables to the first computer; and

configuring an electronic mail system associated with the first computer to route messages addressed to the first computer through the network-based virus screening device.

20. The method of Claim 11, wherein the first computer is communicatively coupled to a local area network and the network-based virus screening device resides outside a firewall associated with the local area network, and wherein the method further comprises:

configuring the network-based virus screening device to inhibit communication of executables to the first computer; and

configuring an electronic mail system associated with the first computer to route messages addressed to the first computer through the network-based virus screening device.

**X. Evidence Appendix (37 C.F.R. § 41.37(c)(1)(ix))**

None.

**XI. Related Proceedings Appendix (37 C.F.R. § 41.37(c)(1)(x))**

None.